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Attorneys for Defendant/Third-Party Plaintiff
InterDent Service Corporation

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POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation; DWIGHT G. ROMRIELL, individually; LARRY R. MISNER, JR., individually; GREGORY ROMRIELL, individually; ERROL ORMOND, individually; and ARNOLD GOODLIFFE, individually,

Third-Party Defendants.

I. INTRODUCTION

Plaintiff Pocatello Dental Group's ("PDG") motion for sanctions is yet another example of the "file first, talk later or not at all" mentality that has governed its behavior throughout this litigation (and before). However, PDG has taken this motion to a new level. The motion is based on InterDent Service Corporation's ("ISC") alleged failure to respond to PDG's discovery requests as required by the Court's August 16, 2004 order—a delay necessitated by counsel for the "Romriell" group of third party defendants refusing to sign on to a form protective order. ISC has now responded in full, but counsel for PDG nonetheless refuses to withdraw the motion. (See Affidavit of Scott Kaplan ¶ 2, Exhibit 1.) This position is inexplicable. The reason for the motion no longer exists, yet PDG is forcing ISC to respond anyway.

II. BACKGROUND

PDG is correct in one regard—discovery in this matter has taken longer than usual. While PDG of course blames ISC solely for such delay, the facts suggest otherwise. As the Court learned during oral argument on Monday, August 9, one of two major issues governing ISC's ability to respond to PDG's discovery requests was the entry of an appropriate protective order.¹ Under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), ISC

¹ The other major issue was whether ISC had to provide information relating to actions prior to October 3, 2003, when ISC's bankruptcy plan was approved, given the fact that the PDG had withdrawn their objection to the bankruptcy plan and had stipulated to certain terms. After

is obligated not to turn over certain sensitive documents pertaining to patients prior to the entry of a protective order signed by *all parties*. 45 CFR § 164.512(e)(1)(v). Counsel for PDG, ISC and Dr. Larry Misner had agreed on an order, but counsel for Drs. Greg Romriell, Dwight Romriell, Errol Ormond and Arnold Goodliffe had not consented. It was not until late September 2004 that a suitable compromise was reached. The Stipulated Order was filed in late September and ISC served its amended discovery responses on October 1. (Kaplan Aff. ¶ 3, Ex. 2.)

With regard to the documents themselves, ISC has repeatedly advised counsel for PDG that responsive documents are also available at ISC's headquarters in El Segundo, California, but PDG has thus far taken no action to review such documents. (*Id.* ¶ 4, Ex. 3-4.) PDG's motion is clearly moot (as well as substantively unfounded).

One other background issue warrants discussion. To the extent PDG believes that ISC has not provided patient "records" as set forth in Article 6.2 (c)(2) of the Management Agreement, the Court learned during telephonic oral argument on Thursday, October 21 (on PDG's Motion for a Temporary Restraining Order) that the parties have a difference of opinion as to the meaning of that term (in summary, ISC's view is that it has provided all patient records and that "records" does not include computerized data compilations derived from the original records; PDG disagrees and argues for expanded definition encompassing ISC's electronic work product). That issue is presently before the Court, and obviously ISC will provide anything the Court deems is required under the Management Agreement. To the extent that ISC's motion for sanctions is based in whole or in part for failure to provide what ISC believes to be patient

considering the matter, the Court decided that ISC should have to provide this information, and ISC has.

"records," it hardly seems appropriate to bring a motion for sanctions at the same time the Court is carefully considering the parties' respective positions.

III. ARGUMENT

The reason that PDG's motion is improper is that it is moot. The motion and PDG's requests for relief are based on ISC not providing a supplemental response to PDG's discovery requests. This is no longer true---once the protective order was entered by all parties, ISC responded in full. Responsive documents are available if and when PDG decides to actually go look at them.

For this reason and as detailed above, ISC's motion for sanctions and the corresponding draconian relief requested (striking ISC's counterclaim and affirmative defenses, refusing to allow ISC to conduct further discovery, and awarding PDG its costs) should plainly be denied.

DATED: October 25, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **INTERDENT SERVICE CORPORATION'S OPPOSITION TO POCATELLO DENTAL GROUP'S MOTION FOR A TEMPORARY RESTRAINING ORDER** on the following named person(s) on the date indicated below:

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